ABB Distribution Sdn Bhd v GKM Development Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-620 OF 1993
KAMALANATHAN RATNAM JC
7 NOVEMBER 1997

Contract *— Formation — Requirement of bank guarantee — Whether condition precedent to formation of contract — Whether concluded contract for supply, installation and commissioning of switchboard*

By a letter dated 1 June 1993, the defendants accepted the plaintiff's offer to supply, install and commission a switchboard. It was a term of the letter that the switchboard would be delivered within seven weeks after receipt of a clarified order and banker's guarantee/letter of credit. The plaintiff proceeded to order the switchboard from its principal upon the defendant's acceptance of the plaintiff's offer and relying on the defendants' representation that they were in the process of raising the bank guarantee. However, the defendant repudiated the agreement by notifying the plaintiff of their intention not to proceed with the purchase of the switchboard. The plaintiff did not accept the defendants' repudiation and filed an action against the defendants. The issue before the court was whether there was any concluded contract between the plaintiff and the defendants for the supply, installation and commissioning of the switchboard.

Held, allowing the plaintiff's claim:

(1) There was sufficient evidence to suggest the formation of a contract between the plaintiff and the defendants. The defendants had accepted the plaintiff's offer by their letter dated 1 June 1993 save and except for the bank guarantee which was not provided for at that time. It was reasonable and acceptable for the plaintiff to proceed to order the switchboard on 3 June 1993 to ensure that the switchboard would be delivered within the delivery deadline. The reason for ordering the switchboard without the bank guarantee was based on the defendants' representation that they were in the process of raising the bank guarantee (see p 298C–F).

(2) The defendants' representation was a clear directive to the plaintiff to order the switchboard. It did not tell the plaintiff not to order the switchboard until the bankers guarantee was received. Furthermore, the circumstances that support the existence of a legally binding agreement were the finalization of the technical details of the switchboard by the defendants' consultant with the plaintiff as soon as the defendants accepted the plaintiff's offer (see p 299C–D).

(3) Based on the correspondence exchanged between the plaintiff and the defendants, the court found that a binding and concluded

contract had been made. The terms essential to the contract had been agreed upon, namely the price, the delivery and the payment. There was nothing to indicate that there were further terms to be negotiated. Neither was there anything to show that something additional was required to be performed before a binding contract existed (see pp 299I–300A).

(4) The provisions of providing the bank guarantee was an essential term of the contract but it was not a condition precedent to the formation of the contract. It was a condition precedent to the delivery of the switchboard and not to the formation of the contract because the plaintiff's letter of offer dated 26 May 1993 was varied by the defendants by way of their letter of acceptance dated 1 June 1993 by their stipulation that the plaintiff do proceed to order the switchboard due to the need to meet the delivery deadline and on the basis that the bank guarantee was being raised (see p 300D–F).

(5) The court also found that the defendants had committed an anticipatory breach of contract since they refused to perform their obligations when they became due (see p 301H).

[Bahasa Malaysia summary

Melalui sepucuk surat bertarikh 1 Jun 1993, defendan-defendan telah menerima tawaran plaintif untuk membekal, memasang dan melengkapkan sebuah papan suis. Adalah merupakan suatu terma surat tersebut bahawa papan suis tersebut akan dihantar dalam jangka masa tujuh minggu setelah penerimaan suatu pesanan yang telah dijelaskan dan gerenti/surat kredit daripada pengurus bank. Plaintif meneruskan untuk memesan papan suis tersebut daripada prinsipal beliau apabila terdapat penerimaan oleh defendan-defendan terhadap tawaran plaintif dan bergantung kepada representasi defendan-defendan bahawa mereka kini sedang dalam proses mendapatkan gerenti bank tersebut. Walau bagaimanapun, defendan-defendan telah menolak perjanjian tersebut melalui notis kepada plaintif berkenaan dengan niat mereka untuk tidak meneruskan dengan pembelian papan suis tersebut. Plaintif tidak menerima penolakan defendan-defendan tersebut dan memfailkan suatu tindakan terhadap defendan-defendan. Isu yang timbul di hadapan mahkamah adalah sama ada wujud sebarang kontrak yang muktamad di antara plaintif dan defendan-defendan untuk membekal, memasang dan melengkapkan papan suis tersebut.

Diputuskan, membenarkan tuntutan plaintif:

(1) Terdapat keterangan yang mencukupi untuk menunjukkan pembentukan suatu kontrak antara plaintif dan defendan-defendan. Defendan-defendan telah menerima tawaran plaintif

melalui surat mereka yang bertarikh 1 Jun 1993 kecuali untuk gerenti bank yang mana adalah tidak diperuntukkan pada masa tersebut. Adalah munasabah dan boleh diterima untuk plaintif menerus dengan memesan papan suis tersebut pada 3 Jun 1993 untuk memastikan bahawa papan suis tersebut akan dihantar dalam jangka masa tarikh akhir penghantaran. Alasan untuk memesan papan suis tersebut tanpa gerenti bank adalah berdasarkan representasi defendan-defendan bahawa mereka sedang dalam proses mendapatkan gerenti bank tersebut (lihat ms 298C–F).

(2) Representasi defendan-defendan merupakan suatu arahan terang kepada plaintif untuk memesan papan suis tersebut. Ia tidak memberitahu plaintif untuk tidak memesan papan suis tersebut sehingga penerimaan gerenti daripada pengurus bank tersebut. Tambahan pula, keadaan-keadaan yang menyokong kewujudan suatu perjanjian yang mengikat di sisi undang-undang adalah dengan muktamadnya butir-butir teknikal papan suis tersebut oleh perunding defendan-defendan dengan plaintif sebaik sahaja defendan-defendan telah menerima tawaran plaintif (lihat ms 299C–D).

(3) Berdasarkan surat-menyurat yang berbalasan di antara plaintif dan defendan-defendan, mahkamah mendapati bahawa suatu kontrak yang mengikat dan muktamad telah dibuat. Terma-terma yang perlu kepada kontrak telah dipersetujui, iaitu harga tersebut, penghantaran tersebut dan pembayaran tersebut. Tidak terdapat apa-apa untuk menandakan bahawa terdapat terma-terma selanjutnya untuk dirundingkan. Begitu juga tiada terdapat apa-apa untuk menunjukkan bahawa terdapat tambahan sesuatu yang perlu dilaksanakan sebelum wujudnya suatu kontrak yang mengikat (lihat ms 299I–300A).

(4) Peruntukan-peruntukan yang memperuntukkan gerenti bank adalah suatu terma perlu tetapi bukan merupakan suatu syarat terdahulu kepada pembentukan kontrak tersebut. Ia merupakan suatu syarat terdahulu kepada penghantaran papan suis tersebut dan bukan kepada pembentukan kontrak tersebut kerana surat tawaran daripada plaintif bertarikh 26 Mei 1993 telah diubah oleh defendan-defendan melalui surat penerimaan mereka bertarikh 1 Jun 1993 melalui syarat mereka bahawa plaintif meneruskan untuk memesan papan suis tersebut kerana wujud keperluan untuk memenuhi jangka masa tarikh akhir penghantaran dan atas dasar bahawa gerenti bank sedang diperolehi (lihat ms 300D–F).

(5) Mahkamah juga mendapati bahawa defendan-defendan telah melakukan suatu mungkir kontrak dalam jangkaan kerana mereka enggan melaksanakan tanggungjawab-tanggungjawab mereka apabila ia menjadi wajar (lihat ms 301H).]

A

Notes

For cases on formation of contract generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2152–2212.

Cases referred to

B

Alghussein Establishment v Eton College [1988] 1 WLR 587 (refd)
Associated Pan Malaysia Cement Sdn Bhd v Syarikat Teknikal & Kejuruteraan Sdn Bhd [1990] 3 MLJ 287 (refd)
Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754 (refd)

C

Charles Grenier Sdn Bhd v Lau Wing Hong [1996] 3 MLJ 327 (refd)
Fercometal Sarl v Mediterranean Shipping Co [1989] 2 All ER 742 (refd)
Finmark Consultants Pte Ltd v Development & Commercial Bank Bhd [1994] 3 AMR 1839 (refd)
Industrial and Agricultural Industrial Sdn Bhd v Golden Sands Construction Sdn Bhd [1993] 2 AMR 2275 (refd)

D

Lau Sieng Nguong v Hap Shing Co Ltd [1969] 1 MLJ 190 (refd)
Trans Trust SPRL v Danubian Trading Co Ltd [1952] 1 All ER 970 (refd)

CM Chew (with *Benjamin Yen*) (*Liza Chan & Co*) for the plaintiff.
Sri Dev Nair (with *HK Gill*) (*Hardarshan Kaur Gill & Co*) for the defendants.

E

Kamalanathan Ratnam JC: By a letter dated 1 June 1993, the defendants accepted the plaintiff's offer to supply, install and commission a 11KV 40KA switchboard ('the switchboard') for RM1,450,000 ('the price'). The price excluded all custom duties and sales tax, and the defendants were to arrange for customs clearance of the switchboard. It was a term of the said letter that the

F

switchboard would be delivered within seven weeks after receipt of a clarified order and banker's guarantee/letter of credit. As this letter dated 1 June 1993 would play a pivotal role in deciding this case it is necessary to reproduce the same:

Our Ref: KA/B803/GEN/TSG/072

G

1 June 1993

M/s ABB Distribution Sdn Bhd
Lot 4 Lorong Enggang 37
Ulu Kelang Industrial Estate
50732 Kuala Lumpur

H

Attn: Mr Low Choon Huat

Dear Sir

30mw Gas Turbine Project
Contract No 18/93/11d2
Package D2-2 Units At Kapar Power Station (Phase 4 Area) 11 Kv 40 Ka Switchboard

I

We thank you for your quotation for the 11 KV, 40KA switchboard in accordance with our single-line diagram No GT30-D2-MB-Y001 (Rev A) in

respect of the above project as per your fax dated 20 May 1993 to Mr TS Gill and fax dated 26 May 1993 to us. A

We are pleased to confirm acceptance of your offer to supply, install and commission the above 11 KV switchboard at RM1,450,000. The delivery permit of seven weeks is noted.

We are in the process of raising the bank guarantee and in the meantime would appreciate if you could proceed with the order to ensure early delivery of the equipment. B

Our consultant, Mr TS Gill of M/s Baitek Professionals Sdn Bhd would finalize all technical details with you.

Thank you. C

Yours faithfully
Gkm Development Bhd-kontek Abadi Sdn Bhd, Jv

Sgd
.....
P MARID SINGH
Authorized Signatory D

The plaintiff thus proceeded to order the switchboard from its principal in Sweden upon the defendants' acceptance of the plaintiff's offer and relying on the defendants' representation that they were in the process of raising the bank guarantee, as stated in the said letter. The defendants however, by their letter dated 9 July 1993, repudiated the agreement by notifying the plaintiff of their intention not to proceed with the purchase of the switchboard. The said letter is also reproduced: E

July 9, 1993 F

Asea Brown Boveri
Lot 4, Lorong Enggang 37
Ulu Klang Industrial Estate
54200 Kuala Lumpur

Attn: Mr Low Choon Huat
Managing Director G

Dear Sir

30MW Gas Turbine Project (Contract No 18/93/11D2) Package D2-2 Units At Kapar Power Station (Phase 2 Area) — 11 KV 40KA Switchboard

We refer to your letter dated 8 June 1993. H

We wish to inform that we are unable to proceed further on the purchase of 11 KV for 40KA Switchboard from your company and consequently did not open up a bank guarantee or a letter of credit to pursue further on our intent to purchase.

We regret for any inconvenience caused and look forward to working with you in our future projects. I

Thank you and best regards.

A Yours sincerely
for GKM Development Bhd — Kontek Abadi Sdn Bhd, JV

Sgd
P Marid Singh
Authorized Signatory

B The plaintiff did not accept the defendants' repudiation. The defendants however refused to complete the purchase of the said switchboard nor did they take delivery of the same. Hence this action by the plaintiff whereby the plaintiff claims as follows:

C	(a)	price of goods	RM 1,450,000	
	(b)	Custom duties and sales tax	149,814.64	
	(c)	freight/custom clearance expenses	1,968.99	
	(d)	warehousing cost/storage charges	3,000	and is still continuing at RM1,500 per month
D				
	(e)	cost in mitigation, ie advertising, etc	5,000	
		Total sum	RM1,609,783.63	

E *Case for the defence*

The defendants contend that on 20 and 26 May 1993, the plaintiff had sent its quotation to the defendants for the supply, installation and commissioning of the switchboard. They maintained that the terms and conditions of the plaintiff's quotation were that:

F (1) The switchboard would be delivered seven weeks after the defendants send their clarified order and banker's guarantee/letter of credit to the plaintiff.

(2) 80% of the purchase price would be paid to the plaintiff after the switchboard was inspected at the plaintiff's factory.

G (3) 20% of the purchase price would be paid after the installation of the switchboard.

On 1 June 1993, the defendants accepted the plaintiff's offer to supply, install and commission the switchboard for RM1,450,000. However, the defendants took into account and accepted the condition that the switchboard would only H be delivered after the plaintiff received the clarified order/banker's guarantee/ letter of credit from the defendants. Subsequently, the defendants informed the plaintiff that they were in the process of obtaining the banker's guarantee and asked the plaintiff whether it could proceed with the order of the switchboard. The defendants also informed the plaintiff that their consultant would liaise with the plaintiff on all the switchboard's technical details. On 2 June 1993, the I plaintiff enquired of the defendants regarding the banker's guarantee and the shipping particulars relating to the shipment of the switchboard. It was the case of the defendants that the plaintiff had never informed the defendants that it

had agreed to process the order of the switchboard without the banker's guarantee. It was also their case that there was no agreement between the plaintiff and the defendants and that the parties were still in the process of negotiations. In the circumstances, the defendants argued that they had not breached any agreement with the plaintiff and that any loss suffered by the plaintiff was due to its own conduct.

The issue

From their respective submissions, I find that the issue to be decided is whether there was any concluded contract between the plaintiff and the defendants for the supply, installation and commissioning of the switchboard.

The evidence

I find that there is sufficient evidence to suggest the formation of a contract between the plaintiff and the defendants. PW1 who was responsible for negotiating the contract on behalf of the plaintiff for the supply of the switchboard stated that the plaintiff was invited by the defendants' consultant to submit its quotation for the supply, installation and commissioning of the switchboard. This evidence is clearly corroborated by DW1. PW1 also confirmed that the defendants had accepted the plaintiff's offer on the terms contained in the quotation dated 26 May 1993, by their letter dated 1 June 1993, save and except for the bank guarantee which was not provided for at that time. I find as a fact, that within a day after receiving the defendants' letter of acceptance dated 1 June 1993, PW1 discussed the technical details for the switchboard with the defendants' consultant, Mr TS Gill. I find that it was reasonable and acceptable for the plaintiff to proceed to order the switchboard on 3 June 1993, to ensure that the said switchboard would be delivered within the delivery deadline of seven weeks. The reason for ordering the switchboard without the bank guarantee was based on the defendants' representation that they were in the process of raising the bank guarantee. It was also the evidence of PW1 that since the defendants had entered into a contract with Tenaga Nasional for and on whose behalf the said switchboard was to be utilized, the plaintiff was not worried about payment. What is certain is that the order was placed on 3 June 1993 and as evidenced by the bill of lading, it was shipped on 21 June 1993. I reject the defendants' submission that the acceptance of the switchboard was 'subject to delivery which can be made only after receipt of a clarified order and a banker's guarantee letter of credit'. I find no evidence that the defendants were still in the process of negotiation with the plaintiff after they had accepted the plaintiff's offer. I also reject the defendants' argument that the standard conditions of sale were part of the plaintiff's quotation for the simple reason that the said sample standard conditions of sale were never annexed to, nor referred to, in the plaintiff's quotation. I accept PW1's evidence that the plaintiff's offer to supply the switchboard as contained in its quotation, superseded the standard conditions. I also find that the

clarified order referred to by the defendants came in the form of the defendants' letter of acceptance dated 1 June 1993. I accept PW1's explanation that the clarified order either acts as an unconditional acceptance of the plaintiff's offer or enables any changes to the terms of their offer to be made by the defendants. It is clear that the only change to the terms of the plaintiff's offer as contained in the defendants' telecopier transmission dated 26 May 1993, is expressly set out in para 3 of the defendants' letter of acceptance dated 1 June 1993, which reads:

> We are in the process of raising the Bank Guarantee and in the meanwhile would appreciate if you could proceed with the order to ensure early delivery of the equipment.

I have no hesitation in finding that the above quoted representation has put to an end the issue raised in this action. To my mind, it was a clear directive to the plaintiff to order the switchboard. It does not tell the plaintiff not to order and deliver the switchboard until the banker's guarantee is received. Furthermore, the circumstances that support the existence of a legally binding agreement are the finalisation of the technical details of the switchboard by the defendants' consultant with the plaintiff, as soon as the defendants accepted the plaintiff's offer. In fact para 3 of the defendants' consultant's letter dated 11 June 1993, to the defendants says:

> We have recommended that an order be placed with ABB who have confirmed delivery of seven weeks from date of order. We note that the order to M/s ABB was confirmed vide your letter dated 1 June 1993 and we are proceeding with finalization of all technical issues with M/s ABB.

The law

In *Lau Sieng Nguong v Hap Shing Co Ltd* [1969] 1 MLJ 190, the then Federal Court held that where a contract is to be deduced from a set of documents it is necessary to look into the whole of the correspondence between the parties to see if the parties have come to a binding agreement. Further in *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754, the then Supreme Court held that the existence of an agreement depends upon the intention of the parties, who must be *ad idem*. It may be inferred from the language used, the parties' conduct, having regard to the surrounding circumstances, and the object of the contract. The court will generally apply an objective or 'the reasonable man' test. Very recently in *Charles Grenier Sdn Bhd v Lau Wing Hong* [1996] 3 MLJ 327, the Court of Appeal held that it is for the court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. It also went on to hold that the law leans in favour of upholding bargains and not in striking them down.

I have no hesitation in holding that based on the correspondence exchanged between the plaintiff and the defendants, a binding and concluded contract had been made. I find that the terms essential to the contract had been agreed upon, namely the price, the delivery and the

payment. There is nothing to indicate that there were further terms to be negotiated. Neither is there anything to show that something additional was required to be performed before a binding contract existed.

To what is the provision of credit a condition precedent to

In *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 1 All ER 970 (CA), Denning LJ made a very pertinent and relevant observation of the buyer's obligation to provide credit. He said at p 976:

> ... The ability of the seller to carry out the transaction is, therefore, dependent on the buyer's providing the letter of credit, and for this reason the seller stipulates that the credit should be provided at a specified time well in advance of the time for delivery of the goods.
>
> What is the legal position of such a stipulation? Sometimes it is a condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation 'subject to the opening of a letter of credit' is rather like a stipulation 'subject to contract'. If no credit is provided, there is no contract between the parties. In other cases, a contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of a contract, but to the obligation of the seller to deliver the goods.

On a similar vein, I find that the provisions of providing the bank guarantee was an essential term of the contract but that it was *not* a condition precedent to the formation of the contract. I hold that it was a condition precedent to the *delivery* of the switchboard and not to the formation of the contract, because the plaintiff's letter of offer dated 26 May 1993 was varied by the defendants by way of their letter of acceptance dated 1 June 1993, by their stipulation that the plaintiff do proceed to order the switchboard due to the need to meet the delivery deadline and on the basis that the bank guarantee was being raised. Furthermore, considering the voice of urgency as expressed by the defendants' own consultant in their letter dated 11 June 1993, I am constrained to hold that time was of the essence of this contract as it was necessary to meet the delivery deadline of seven weeks. This was why the plaintiff placed the order for the switchboard within two days after the defendants accepted the plaintiff's offer. I am fortified and strengthened in holding this view when I refer to *Associated Pan Malaysia Cement Sdn Bhd v Syarikat Teknikal & Kejuruteraan Sdn Bhd* [1990] 3 MLJ 287 where the then Supreme Court held that whether or not time is of the essence of a contract must depend on the facts and circumstances of each case. Intention of the parties gathered from the instrument itself together with the surrounding circumstances must be looked at.

In any event, it is clear from the evidence of DW1 that he has no direct personal knowledge of what transpired between the plaintiff and the defendants, and he was also never involved in the negotiation for the purchase of the switchboard from the plaintiff.

The conduct of the defendants, having expressly represented to the plaintiff that they were in the process of raising the bank guarantee and thus

requesting the plaintiff to proceed with the order of the switchboard to ensure its early delivery, and now reneging on that said representation, must be looked at in the light of DW1's evidence. It is obvious that by 23 June 1993, the defendants had already decided to place an order for the switchboard with another supplier, namely LKH Switchgear Sdn Bhd ('LKH') after they discovered that they could obtain the same at RM1.2m from LKH. This is evident from LKH's letter, invoice and the defendants' payment voucher, all dated 23 June 1993 and the letter of credit dated 29 June 1993, in favour of LKH. In any event the defendants went ahead with the purchase of the switchboard from LKH inspite of their own consultant's letter dated 11 June 1993, wherein the said consultant had in no uncertain terms expressed the unsuitability of LKH's switchboard.

The blatant and bare-faced repudiation of the contract by the defendants must be faced with the stonewall defence of estoppel. Parties who had consciously entered into a contract at arm's length must take the bouquets and the brickbats with equal candour. If the conduct of the defendants is given judicial approval, it becomes a mockery to bargains willingly entered into, and would be an open licence and precedent for any disgruntled contractee to an agreement to rescind the contract on frivolous and vexatious grounds. The majesty of the court must not be brought down to base levels. The conduct of the defendants herein is most unconscionable. No satisfactory explanation whatsoever was given by the defendants as to why they decided to wait until 9 July 1993, to inform the plaintiff of their intention not to purchase the plaintiff's switchboard which by that time, on the evidence before me, had been shipped and was due to arrive by 15 July 1993, thus meeting the agreed delivery deadline. The only conceivable reason I can gather is the saving of RM250,000.

In *Finmark Consultants Pte Ltd v Development & Commercial Bank Bhd* [1994] 3 AMR 1839, the then Supreme Court quoted with approval a passage by Lord Ackner in *Fercometal Sarl v Mediterranean Shipping Co* [1989] 2 All ER 742 (at p 1862):

> When *A* wrongfully repudiates his contractual obligations in anticipation of the time for their performance, he presents the innocent party *B* with two choices. He may either affirm the contract by treating it as still in force or he may treat it as finally and conclusively discharged. There is no third choice ... .

In the present case the plaintiff has elected to affirm the contract. I can find nothing wrong in that.

I also find based on the decision of *Industrial and Agricultural Industrial Sdn Bhd v Golden Sands Construction Sdn Bhd* [1993] 2 AMR 2275 that the defendants had committed an anticipatory breach of contract since they refused to perform their obligations when they became due.

Lastly, it is my judgment that a contracting party will not in normal circumstances be entitled to take advantage of his own breach as against the innocent party. This hallowed principle was set by the House of Lords in *Alghussein Establishment v Eton College* [1988] 1 WLR 587.

In all the circumstances and having read all the cases cited by both parties, I find that there was a concluded contract between the parties herein and that the defendants had breached the same. I therefore entered judgment for the plaintiff with costs and ordered that damages be assessed before the deputy registrar.

Claim allowed.

Reported by Jafisah Jaafar